MBF FINANCE BHD

v.

TEOH SOON KOK

HIGH COURT MALAYA, ALOR SETAR
ZAINAL ADZAM J
[CIVIL APPEAL NO: 12-31-2000]
5 NOVEMBER 2006

CONTRACT: *Agreement - Equipment lease agreement - Construction of terms - Effect - Whether distinguishable from sale and purchase agreement or hire purchase agreement - End of lease period - Rentals paid for and settled by lessee - Whether still duty bound to return goods to lessor*

By an Equipment Lease Agreement dated 9 January 1991 ('the Agreement'), the appellant agreed to lease to the respondent a forklift for a period of 36 months. The evidence showed that, upon the natural expiration of the Agreement on 8 January 1994, the respondent had settled all the rentals, except for a certain accumulated interest amounting to RM1553.21. The respondent did not return the forklift in question, and on 18 May 1994 the appellant repossessed the said forklift. The respondent contended that the repossession was wrongful in law, and in the circumstances sued the appellant for detinue and conversion. Subsequently, however, the respondent paid the accumulated interest, purportedly to mitigate damage. Be that as it may, the learned Sessions Court judge, upon a deliberation particularly of art. 21 of the Agreement, ruled that the repossession was contrary to the Agreement and secondly that the appellant had failed to prove the accumulating interest – and so - awarded the respondent RM250,000 in damages and dismissed the appellant's counter-claim for the accumulated interest. The appellant appealed and argued that the repossession was lawful since it was the legal owner of the forklift at the material time and was entitled to repossess the forklift pursuant to art. 25 of the Agreement. Relying on article 28 para 4 of the Agreement, the respondent retorted that the forklift must on the facts be deemed to have been sold to him and became his property.

Held (allowing the appeal):

(1) Apart from art. 21, the Sessions Court did not fully consider the Agreement or other documents for that matter. The Agreement is important as it governs the relationship between the parties. (para 9)

A **(2)** The Sessions Court failed to consider that the Agreement between the parties was an equipment lease agreement and not a sale and purchase agreement or a hire purchase agreement. Under an equipment lease agreement, the title or ownership of the property or goods is retained by the lessor. The hirer is obliged to return
B the leased property or goods at the end of the agreed term. (para 10)

(3) As for art. 28 para 4 of the Agreement, the respondent's argument thereon ignored the requirements of the 2nd limb of that paragraph. The forklift will be deemed to be sold but the
C respondent was required to compensate the appellant for the capital loss by paying the full amount of residual value. As stipulated in the Schedule of the Agreement, the residual value at the material time stood at RM15,000. (para 16)

D **(4)** The Sessions Court judge's construction of art. 21 failed to give effect to the clear words of that article read with other provisions of the Agreement. The words "any other sums or monies due and payable under this Lease Agreement" would include "overdue interest" and "interest on overdue payment" which are expressly
E provided in the Schedule and art. 22 respectively. Had the learned judge studied P2, the Statement of Installment Payments, he would have seen that the respondent was irregular and late with his monthly payments. That would have triggered the overdue interest provision of art. 22 of the Agreement. Therefore, at the time of the repossession the appellant was properly exercising its
F rights as the legal owner of the forklift pursuant to art. 21 (para (b)) and art. 25 of the Agreement. (paras 18 & 19)

(5) The Sessions Court judge was wrong to say that the appellant had failed to prove the amount of accumulated interest due from
G the respondent. The accumulated interest was indeed confirmed by the respondent's own action when he settled the full sum due on 6 July 1994 despite filing the action against the appellant. The respondent's explanation that the payment was to 'mitigate damages' was fallacious and contradictory to his claims in this
H case. (para 20)

(6) The respondent's claim for the tort of conversion and detinue must fail. To constitute a tort of conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights, an intention in so doing to
I deny the owner's right or assert a right inconsistent with them.

Detinue can be defined as the illegal detention of goods. In both there is a denial of the rights of the legal owner to the goods. (para 21)

(6a) On the facts, it was the respondent who had *prima facie* committed the tort of detinue from the time the Agreement naturally expired on 8 january 1994 to the date of the repossession on 18 May 1994. The appellant was the legal owner throughout and clearly the respondent was duty bound to return the forklift to the appellant pursuant to art. 25 of the Agreement. (para 22)

Case(s) referred to:

Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 CA ***(refd)***

Credit Corp (M) Sdn Bhd v. KM Basheer Ahmed KM Maghdoom Mohideen & Anor [1985] 2 CLJ 351; [1985] CLJ (Rep) 94 FC ***(refd)***

Lam Teik Kai v. Hallam Nominees Ltd [1971] 1 MLJ 146 ***(refd)***

Tay Kian Hock v. Kewangan Bersatu Bhd [2002] 8 CLJ 982 HC ***(refd)***

Other source(s) referred to:

John N Adams, *Commercial Hiring and Leasing*, Butterworth, p 44

Norchaya Talib, *Law of Torts*, 2nd edn, p 62

For the appellant/defendant - Hargopal Singh; M/s Hargopal Singh & Co

For the respondent/plaintiff - C Shanmugaian; M/s C Shanmugaiah & Co

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Zainal Adzam J:

[1] On 9 January 1991 the respondent (plaintiff) and the appellant (defendant) entered into an "Equipment Lease Agreement" (P1) whereby the appellant agreed to lease to the respondent a forklift for a period of 36 months. The monthly rental for the lease was RM1,152. The respondent was required to pay the 36th month rental upon signing the agreement. The natural expiration of the lease was on 8 January 1994. On 1 February 1994 the respondent paid the 35th monthly rental to the appellant. As the 36th monthly rental was prepaid, all the rental payments due were deemed to be settled.

[2] However on 18 May 1994 the appellant repossessed the forklift from the possession of the respondent, ie, more than three months after the natural expiration of the lease.

[3] After the repossession, the appellant sent three letters to the respondent, two letters from them and one through their solicitors dated 23 May 1994, 24 May 1994 and 29 June 1994. The three letters mentioned about "arrears of rental", and "over-due interest" being outstanding from the respondent. On 26 May 1994 the respondent filed an action against the appellant at the Sungai Petani Sessions Court praying for orders that the appellant return the forklift immediately; damages for breach of the agreement; general damages for the tort of detinue and conversion; and, special damages of RM6,000 per day from 18 May 1994 onwards. The above-mentioned brief facts are not disputed by both parties.

[4] On 6 July 1994 (in the words of the respondent's counsel's submission) "... as a move to mitigate damages the plaintiff settled whatever sum due to the defendant and took back the forklift from the defendant and until today is still in possession and using it for his business ...". The respondent's allegation at the Sessions Court was that the appellant wrongfully repossessed the forklift as they had paid all the rent under the equipment lease agreement. The appellant according to the respondent thus committed the tort of conversion and detinue. As a result of the wrongful repossession of the forklift for 52 days (from 18 May 1994 until 6 July 1994) the respondent claimed a loss of income of RM6,000 per day.

[5] The appellant in his statement of defence disputed the respondent's claims and counter-claimed RM1,553.21 being arrears and overdue interest. The learned Sessions Court judge decided the case on one main issue: whether the appellant had the right to repossess the forklift solely on the default of the respondent for the over due interest. The Sessions Court judge referred to art. 21 of the agreement which reads:

> If the lessee fails to pay the Rent provided for under Article 3 hereof after the same becomes due and payable or any other sums or monies due and payable under this Lease Agreement ... the Lessor have the right forthwith to exercise all or any of the following remedies without having to give any prior notice or demand to the lessee:
>
> (a) ...
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> (b) to take possession of the Equipment or demand its return;
>
> (c) ...

[6] According to the Sessions Court judge art. 21 mentioned "rent" but did not mention "over-due interest" or "accumulating over-due interest". The judge then posed this question:

> ... Bagaimanapun Article 21 di atas ada menyebutkan juga "or any other sums or monies due and payable under this Lease Agreement ....". Defendan bagaimanapun mengesahkan bahawa kesemua "36 monthly installment" di bawah P1 telah pun dijelaskan oleh Plaintif, cuma jumlah "accumulating overdue interest" sahaja yang masih dituntut iaitu berjumlah RM1,553.21. Adakah jumlah di atas merupakan "any other sums or monies due and payable under this Lease Agreement" dan ia membolehkan Defendan mengambil balik jentera forklift tersebut?.

[7] The judge concluded that the amount due from the respondent which was for "accumulating interest" amounting to only RM1,553.21 was a minor breach of the agreement and not a fundamental breach by the respondent which did not entitle the appellant to terminate the agreement. He relied on the case of *Ching Yik Development Sdn. Bhd. v. Setapak Heights Development Sdn. Bhd.* [1997] 1 CLJ 287, 296 where the Court of Appeal stated:

> ... If the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach complained of are not serious in the sense that they do not go to the root of the contract, then the term in question is a subsidiary one entitling the innocent party to recover damages but not to treat the contract as being at an end.

[8] In addition the judge stated that the sum of RM1,553.21 which was counter-claimed by the appellant was not proven on a balance of probabilities as to how it was due. The counter-claim of the appellant was therefore dismissed as it showed that the act of the appellant in repossessing the forklift was contrary to the terms of the agreement. The judge lastly agreed with respondent's claim for special damages at RM5,000 a day for 52 days but as the jurisdiction at the Sessions Court is limited to RM250,000 the award was fixed at RM250,000 with 8% interest until full settlement of the sum. The issue of the tort of detinue and conversion was not decided by the Sessions Court.

[9] In this appeal the appellant pointed out that the Sessions Court failed to decide as to who was the owner of the forklift on the date of repossession, ie, 18 May 1994. The appellant argued that if at the material time the owner was the respondent, then the Sessions Court has to decide the amount of loss suffered by the respondent due to the wrongful repossession by the appellant. On the other hand, if the Session Court finds that the appellant was the owner of the forklift at the material time, then the respondent claim must fail. On this matter, I am in agreement with the appellant's submission. Apart from art. 21, the Sessions Court did not fully consider the equipment lease agreement or other documents for that matter. That agreement is important as it governs the relationship between the two parties.

[10] Firstly, the Sessions Court failed to consider that the agreement between the appellant and the respondent as the title clearly showed, was an equipment lease and not a sale and purchase agreement or a hire-purchase agreement. The case of *Chin Yik Development Sdn. Bhd. v. Setapak Heights Development Sdn. Bhd.* is concerned with a sale and purchase agreement. Under an equipment lease agreement, the title and ownership of the property or goods is retained by the lessor. The hirer is obliged to return the leased property or goods at the end of the agreed term. *The Encyclopedia of Forms And Precedents*, Fifth Edition, Vol. 25, 461 states:

> The Equipment Leasing Association provides the following definition:
>
> > A Lease is a contract between lessor and lessee giving the lessee possession and use of a specific asset on payment of rentals over a period. The lessor retains ownership of the asset so that it never becomes the property of the lessee or any related third party.
>
> The Statement of Standard Accounting Practice SSAP 21 states:
>
> > 'A Lease' is a contract between a lessor and a lessee for the hire of specific asset. The lessor retains ownership of the asset and conveys the right to the use of the asset to the lessee for an agreed period of time in return for the payment of specified rentals.

[11] Further at p. 461, it states:

> The hiring. The fact that the amount payable by the lessee contains a financial charge does not in itself prevent the contract from being one of hire; nor does the fact that the hiring is contemplated by the parties to continue after the expiry of the 'primary period' for a secondary period of hiring for the residue of the useful life of the goods.
>
> ... Therefore, whilst possession of the goods is acquired by the lessee, the absolute property in the goods remains in the lessor throughout the period of hire. As a result, the lessee cannot in any circumstances lawfully dispose of the property in the goods to a third party. If the bailment comes to an end, whether by the effluxion of time or by some act of the lessor or lessee, the right to possession of the goods reverts to the lessor and the lessee is under an obligation to deliver them up to the lessor or his nominee ... .

[12] The Federal Court in *Credit Corp. (M) Sdn. Bhd. v. KM Basheer Ahmed KM Maghdoom Mohideen & Anor* [1985] 2 CLJ 351; [1985] CLJ (Rep) 94 defined an equipment lease agreement as follows:

A lease is defined as a contract between a lessor and lessee for the hire of a specific asset selected from a manufacturer or vendor of such asset. The lessee has possession and use of the asset on payment of specified rentals over a period.

[13] The difference between hire-purchase and leasing was clarified in *Commercial Hiring and Leasing* by John N Adams, Butterworth at p. 44 as follows:

Hire purchase involves therefore a bailment of goods by the owner to the hirer, and an agreement by which the hirer has an option to return to purchase the goods at some time or another. Straight forward leasing is exactly the same: a bailment of goods by the owner to the hirer, but without the option to purchase then (the absence of the option to purchase, or anything which might colourably amount to an option to purchase is of crucial importance).

[14] The various provisions in P1, as follows, confirmed the matter:

Article 8 Ownership

The Lessee acknowledges that ownership and title to the Equipment after delivery thereupon to the Lessee shall remain vested in the Lessor and the lessee shall have no right or interest thereon otherwise than as a bailee thereof and it is agreed that the Equipment shall at all times remain the sole and exclusive property of the Lessor.

Article 15 Prohibition of Transfer

The Lessee shall not attempt to transfer, sell or otherwise dispose of the Equipment or do any other act that infringe upon the Lessor's ownership.

Article 25 Surrender of Equipment

Nothing herein shall place any obligation upon the Lessor to do any act for the purpose of recovering possession of Equipment. The duty to surrender or redeliver the Equipment upon earlier termination or natural expiration or this Lease Agreement lies with the Lessee at the latter's cost.

Article 42 No Option To Purchase

This Lease Agreement shall at no time and shall under no circumstances whatsoever be deemed to be read as a hire purchase agreement as defined in the Hire Purchase Act, 1967 and no option to purchase the Equipment is hereby conferred on the Lessee.

[15] The appellant therefore argued that the Sessions Court erred in not considering that at the time of the repossession, the equipment lease agreement had naturally expired and notwithstanding that all the rental payments under the agreement was settled by the respondent the appellant had the right to repossess the forklift. The appellant relied on art. 25 of the agreement to show that at the material time it was in fact the duty of the respondent to surrender the forklift to the appellant. The respondent's counsel objected to the appellant's argument based on article 25 as according to him it was never raised in evidence or argument before the Sessions Court. The Sessions Court judge according to him thus had no opportunity to consider it. This argument surely cannot be accepted. In considering his decision the Sessions Court judge was duty-bound to study and consider all the relevant documents and evidence available before the court, not just the submissions of the parties. This is necessary for him to arrive at a proper and a correct decision on the matter before him. The respondent's counsel further argued that the effect of art. 21 of the agreement is reflected in the 4th paragraph of art. 28 of the agreement which reads:

> ... If the equipment shall not be surrendered to the lessor, than it is deemed that the equipment shall have been sold and no proceeds were received there from and the lessee shall pay the lessor full amount of residual value by way of indemnity of capital loss.

[16] The argument on behalf of the respondent was that since the respondent did not surrender or redeliver the forklift to the appellant, the said forklift was deemed to have been sold to the respondent and became the property of the respondent pursuant to art. 28 para. 4. This argument conveniently ignored the requirements set out in the 2nd limb of that paragraph. The forklift will be deemed to be sold but the respondent was required to compensate the appellant for the capital loss by paying the full amount of residual value. The residual value as stipulated in the schedule of P1 was RM15,000. That amount was never paid by the respondent to the appellant. The respondent's counsel also conveniently excluded in his submission the last limb in para. 4 of art. 28 which reads:

> ... In addition, the Lessee further agrees to pay to the Lessor by way of liquidated damages for detention a daily sum equal to one thirtieth of the monthly rental referred to in the Schedule hereof ...

[17] As such, it is not surprising why the Sessions Court judge never referred to these provisions.

[18] Secondly the Sessions Court judge's construction of art. 21 failed to give effect to the clear words of that article read with other relevant provision of the agreement. The words "any other sums or monies due and payable under this lease agreement" would include "overdue interest" and "interest on overdue payment" which are expressly provided in the schedule and art. 22 respectively. Had the Sessions Court judge studied P2 (statement of payment installment) he would have seen that the respondent was irregular and late with his monthly payments. That would have triggered the overdue interest provision of art. 22 of the agreement. In addition the respondent in cross-examination did acknowledge this matter where he stated:

S - Adakah setuju jika ada tunggakan maka overdue interest terpakai?

J - Ya, setuju.

Ya, perjanjian ditandatangani pada tahun 1991, setuju kalau bayar bulanan dikira dengan tepat ia telah lama tamat tempoh. Betul saya telah buat bayaran setiap bulan.

S - Oleh itu bank boleh kenakan overdue interest?

J - Ya.

[19] Therefore, to sum up the matter, at the time of the repossession the appellant was then properly exercising as rights as the legal owner of the forklift pursuant to arts. 21, para. (b) and 25.

[20] The right of the appellant to the accumulated interest in this case was actually not only acknowledged by the respondent but was also confirmed by his own actions when he settled the full sum due despite filing the action against the appellant for wrongful repossession of the forklift. His counsel's explanation for the payment is fallacious and manifestly contradictory to his claims in this case. According to his counsel's explanation the settlement was to "mitigate damages". The appellant's counter-claim for amount due was RM1,553.21. The respondent settled it on 6 July 1994. This sum and the settlement by the respondent was reflected in P2 at the entry dated 6 July 1994. So it was wrong for the Sessions Court judge to say that the appellant failed to prove the amount due from the respondent. Even the respondent himself acknowledged the amount due by settling it and it was not settled on a "without prejudice" basis.

[21] Based on all the aforesaid, the respondent's claim against the appellant for the tort of conversion and detinue accordingly failed. To constitute a tort of conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights, an intention in so doing to deny the owner's right or assert a right

A inconsistent with them (*Lam Teik Kai v. Hallam Nominees Ltd.* [1071] 1 MLJ 146, 147, and *Tay Kian Hock (Ha Hock Yen Co) v. Kewangan Bersatu Bhd.* [2002] 8 CLJ 982). Detinue can be defined as the illegal detention of goods. The possession becomes illegal due to the withdrawal of consent by the owner of the goods, who initially may have consented
B to the defendant having possession of the same goods. (*Law of Torts* by Norchaya Talib, 2nd edn, p. 62). In both conversion and detinue there is a denial of the rights of the legal owner to the goods.

[22] Going on the facts of this case, it would appear, *prima facie*, that it was the respondent who committed the tort of detinue from the time
C the agreement naturally expired (8 January 1994) to the date of the repossession by the appellants (18 May 1994). The appellant was the legal owner throughout and upon the natural expiration of the agreement on 8 January 1994, the respondent was duty bound to return the forklift to the appellant pursuant to art. 25 of the agreement. As it transpired,
D the respondent retained possession of the forklift more than four months after that date. The appellant exercised their right to repossess the forklift only on 18 May 1994. Based on the 4th paragraph of art. 28 of the agreement the respondent was actually liable to pay a penalty by way of liquidated damages of a daily sum equal to one thirtieth of the
E monthly rent to the appellant for that period of his retention of the forklift. Perhaps that was why the respondent paid the full sum due to the appellant despite suing them. However, it would not mitigate the damages due to the appellant had they prayed for them in their counter-claim. That is because according to the agreement the penalty was
F separate from the overdue interest demanded by the appellant.

[23] This appeal is therefore allowed with costs. However, since the amount due as prayed was settled by the respondent to the appellant there is no order to prayers (a) and (b) of the appellant's counter-claim.

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